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No. _____

In the Supreme Court of the United States

HILL'S PET NUTRITION, INC.,
Petitioner,

v.

CAROL L. ISAACS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a charge timely complaining that co-worker acts contributed to a hostile work environment in violation of Title VII preserves every allegation that otherwise time-barred acts—however unrelated—contributed to that hostile environment so long as the complaining employee remained within the same "chain of command."

PARTIES TO THE PROCEEDING

The parties in the court of appeals were Carol L. Isaacs, plaintiff-appellant, and Hill's Pet Nutrition, Inc. and Colgate-Palmolive Company, defendants-appellees. Colgate-Palmolive Company is not a petitioner because it was dismissed by the district court, and the court of appeals affirmed its dismissal.

RULE 29.6 STATEMENT

Colgate-Palmolive Company is the parent company of Hill's Pet Nutrition, Inc., and holds 100% of the stock of Petitioner Hill's Pet Nutrition, Inc. No publicly held company holds 10% or more of Colgate-Palmolive Company's stock. Colgate-Palmolive Company has no parent company.

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PETITION FOR A WRIT OF CERTIORARI

Hill's Pet Nutrition, Inc., respectively petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a - 9a) is printed at 485 F.3d 383. The opinion of the District Court (App. 10a - 56a) is unreported. The Court of Appeals' order denying rehearing (App. 1a - 2a) is unreported.

JURISDICTION

The Court of Appeals issued its opinion on May 4, 2007. It denied rehearing and rehearing en banc on May 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-5(e)(1) provides:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or

> to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

This case addresses which, if any, stale allegations of co-worker harassment may be preserved as part of a Title VII hostile work environment claim if any allegation occurs within the limitations period. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), this Court ruled that a timely-filed charge preserved all allegations that are part of the "same actionable hostile environment" but did not adopt a rule to determine which allegations are part of that actionable environment. Despite ample time for percolation, the lower courts continue to struggle with the issue, as illustrated by the conflicts between Chief Judge Easterbrook's decision in this case and decisions in other circuits. This disarray means that the law is enforced differently in different jurisdictions and that the federal agency charged with enforcing the statute is left with ambiguous guidance.

This question is vitally important because of the number of hostile work environment claims in the federal courts. The Equal Employment Opportunity Commission receives more than 12,000 sexual harassment complaints annually, and more than 15,000 employment discrimination cases are filed in the federal courts each year, many including hostile work

environment claims.[1] Settling this question will allow some cases (including this one) to be terminated before trial and, for those cases going to trial, will instruct the lower courts which evidence is relevant to the hostile work environment claim.

Morgan applied, but did not adopt, three factors suggested by the Ninth Circuit to determine whether conduct is part of the same actionable harassment—the type of harassment, its frequency, and whether it occurred under the same managers. Following *Morgan*, lower courts have inconsistently applied these factors, reaching different conclusions on how much earlier incidents must resemble those incidents that occurred within the limitations period, and on what management actions can cut off liability. "*Morgan* itself does not offer precise guidance on how to evaluate whether an act that falls outside the statutory time period can nonetheless be considered for liability purposes." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1114 n.6 (9th Cir. 2004).

Moreover, under any interpretation, the rule announced by the Seventh Circuit goes well beyond the outer limits set by *Morgan*. Instead of analyzing the relatedness of co-worker conduct to determine if it was part of the same actionable harassment, the Seventh Circuit stated categorically that *all* acts while the complaining employee was under the same "chain of command" must be included in the hostile work environment, no matter how dissimilar and even if (as in this

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[1] Equal Employment Opportunity Comm'n, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2006, available at* http://www.eeoc.gov/stats/harass.html (last visited Aug. 24, 2007); Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, Table C-2 (Mar. 31, 2006), *available at* http://www.uscourts.gov/caseload2006/contents.html.

case) the employee was transferred away from prior harassers. This Court should grant the writ to clarify this important issue and eliminate the lower courts' division and confusion.

A. Isaacs's Allegations

Carol Isaacs contended that co-worker conduct made working conditions at Hill's Pet Nutrition's Richmond, Indiana plant intolerable for her. In her affidavit, she alleged problems in her sixty-three months of employment from 1999 to 2003, which she contends amounted to a hostile work environment based on sex.

Hill's manufactures pet food, and its Richmond operation is divided into four areas: Packaging (where Isaacs worked first), Stretchwrap (where she worked later), Dry Mix (where she worked last), and Processing. App. 12a, 14a. Isaacs alleged problems with different co-workers in each of the areas in which she worked. App. 40a - 44a.

Isaacs alleged that when she worked in Packaging, a co-worker "refused to train her unless she listened to him describe his sexual exploits and desires." App. 7a. She said he stopped training her when she insisted he stop the unwanted conversation. *Id.* Also in Packaging, she alleged frequent unwanted sexual talk and noisemaking over the common radio frequency. App. 7a - 8a.

Isaacs was moved from Packaging to Stretchwrap in an acknowledged effort to address her complaints. The record is undisputed that Isaacs agreed to this transfer, that, following the transfer, she no longer worked with the Packaging co-worker, and that the conduct she had complained about involving him stopped. Seventh Cir. Supp.

App. 15-16 (102:21-103:10, 105:16-106:12), 17 (130:25-131:7), 19 (146:11-147:16), 100 (33:11-15).

Isaacs alleged that after she was transferred to Stretchwrap, "1) She glimpsed objectionable materials on computer screens two times; 2) she frequently heard comments over the radio in Stretchwrap [where she worked] about 'dragging my wood,' or 'my wood' awful long' that she took to be sexual references." She also alleged that "3) [co-worker] Pebworth twice told her that her rear end was so big that two men could climb on it; 4) Pebworth made crying sounds over the radio in an effort to mock her, used the word 'bitch' in her presence a few times, and the term 'fucking bitch' twice in reference to someone other than Isaacs." App. 5a – 6a.

Isaacs was assigned to yet a third department—Dry Mix—after an extended leave of absence. Isaacs alleged that different employees acted angry at her and that one co-worker pulled her ears and bent her head forward and then said, "write that in your little book." Seventh Cir. App. 93-94.

Isaacs filed her first charge alleging sexual harassment on January 31, 2003. App. 26a. The charge was filed during her assignment to Stretchwrap and more than 300 days after her transfer out of Packaging. App. 29a – 30a. Isaacs never filed a charge during her employement after her transfer to Dry Mix.

Isaacs's lawsuit also alleged Title VII discrimination, Family and Medical Leave Act violations, and retaliation. The District Court granted summary judgment in Hill's favor on all Isaacs's claims, and the Seventh Circuit affirmed as to all the claims except hostile work environment. App. 55a, 8a.

B. District Court Judgment

After reviewing the evidence in detail, the District Court granted summary judgment to Hill's on all claims, explaining its decision in a forty-two-page order. The District Court concluded that Isaacs's allegations of conduct in Stretchwrap were not sufficiently severe or pervasive to constitute a hostile work environment when judged by an objective standard. App. 40a - 43a. The allegations of conduct in Stretchwrap were the only ones that fell within the 300-day limitations period covered by Isaacs's complaint to the Equal Employment Opportunity Commission. *See* App. 36a (Isaacs's transfer to Stretchwrap occurred in October 2001). The District Court concluded that Isaacs subjectively found the conduct to be hostile, but her sex-based allegations did not involve severe or pervasive conduct and her other allegations merely alleged inappropriate behavior that was not sex-based. App. 41a - 42a.

The District Court also rejected Isaacs's claim that certain actions that occurred outside the limitations period were part of the same alleged hostile work environment. App. 30a - 32a. These allegations all stemmed from Isaacs's time working in the Packaging portion of the plant, which was physically separate and involved an entirely different set of co-workers. App. 30a. The District Court concluded that Isaacs failed to prove any link between the acts and actors complained of in Packaging with those in Stretchwrap; rather, they "occurred under entirely different working conditions, involving completely different actors, and simply cannot be described as relating to her timely allegations." *Id.*

C. Seventh Circuit Opinion

In an opinion by Chief Judge Easterbrook, the Seventh Circuit took a different view of the hostile work environment claim, declining to analyze separately the work environments in Stretchwrap and Packaging. The Seventh Circuit acknowledged that "[t]he [Stretchwrap and Packaging] teams have different leaders and work in different parts of the plant," but did not further analyze the working environment, co-workers, or supervisors in the two areas. App. 5a.

The Seventh Circuit instead determined that, because the employer, not employees, is held liable under Title VII, it did not matter that Isaacs was allegedly harassed by one group of co-workers in Packaging and a different group in Stretchwrap. App. 6a. The Seventh Circuit created this rule: "As long as the employee remains in the same chain of command, however, and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and all events may be considered (subject to the possibility of laches) to determine whether that employment practice violates Title VII." App. 7a. The Seventh Circuit concluded that a reasonable fact finder could determine that Isaacs's allegations, if proved, constituted an actionable hostile work environment, so it reversed the District Court's summary judgment on the hostile work environment claim. *Id.*

D. *National Railroad Passenger Corp. v. Morgan*

In *Morgan*, this Court ruled that some acts outside the filing period may be deemed part of the "whole" hostile environment claim "for the purposes of timely filing and liability." *Morgan*, 536 U.S. at 118. Accordingly, a "charge alleging a hostile work environment will not be time barred

if all acts constituting the claim *are part of the same unlawful practice* and at least one act falls within the filing period." *Id.* (emphasis added).

But *Morgan* connects hostile acts within and outside the period only if they are related. Specifically, *Morgan* left undisturbed the Ninth Circuit's approach, inquiring whether acts, "involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers" to determine whether they belonged to the same hostile environment. *Id.* at 120. Although *Morgan* acknowledged the Ninth Circuit's factors, it did not adopt them. Thus, *Morgan* left lower courts without clear guidance as to which otherwise-time-barred acts are included in a hostile work environment.[2]

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's approach goes far beyond the boundaries described in *Morgan* and adopted by other circuit courts in determining what conduct is to be included in a

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[2] *See also* Amanda J. Zaremba, Comment and Casenote, National Railroad Passenger Corp. v. Morgan: *The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers*, 72 U. Cin. L. Rev. 1129, 1157 (2004) (noting that the required analysis "creates a dilemma for lower courts, which must determine exactly what evidence of time-barred acts may be taken into consideration"); Tara-Ann Topputo, Note, *In Opposition To Applying the Continuing Violation Doctrine to Hostile Work Environment Claims:* National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), 28 U. Dayton L. Rev. 449, 478-79 (2003) (noting that "the *Morgan* Court provides no guidance" as to the determination of whether acts are part of the same actionable work environment and citing practitioners' concerns).

hostile work environment claim under Title VII. Its "chain of command" rule conflicts with the application of *Morgan* by other circuits. Moreover, it expands hostile environment claims—and thus the 180-and 300-day limitations periods under Title VII—in derogation of Congress's expressed preference for the prompt and voluntary resolution of Title VII claims.

The Seventh Circuit's approach also adds to the confusion among the lower courts. In the past five years, this Court has emphasized that the charge-filing deadlines of Title VII are deliberately short and precise. *Ledbetter v. Goodyear Tire & Rubber Co.*, __ U.S. __, 127 S.Ct. 2162, 2170 (2007); *Morgan*, 536 U.S. at 101. But, as to hostile work environment claims, this Court has not clarified how a court should go about the "court's task" of "determin[ing] whether acts about which an employee complains are part of the same actionable hostile work environment practice." *Morgan*, 536 U.S. at 120.

The Court should grant certiorari to resolve this confusion and end the circuits' conflict. Without intervention, the lower courts will continue to apply disparately what should be a uniform statutory limitations scheme.

I. THE STANDARD ADOPTED BY THE SEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Standard Announced Below Conflicts with Standards Applied by Other Courts of Appeals.

The circuits have diverged in their application of *Morgan*'s direction that "consideration of the entire scope of a hostile work environment claim, including behavior alleged

outside the statutory time period, is permissible for the purposes of assessing liability" as long as one act contributing to the alleged hostile environment occurs during the period. *Id.* at 105. Only in the Seventh Circuit is the "same chain of command" necessary or sufficient to unify disparate acts of individual co-workers into a single unlawful practice. The Seventh Circuit's categorical rule elevates continuity of management to the exclusion of any other relevant factors and thereby conflicts with the law of at least five other circuits.

1. In *Porter v. California Dep't of Corrections*, 419 F.3d 885 (9th Cir. 2005), the Ninth Circuit accepted *Morgan*'s guidance that courts should ask "whether the earlier and later events amounted to 'the same type of employment actions, occurred relatively frequently, [or] were perpetrated by the same managers.'" *Porter*, 419 F.3d at 893 (quoting *Morgan*, 536 U.S. at 120). The court examined whether allegations of acts occurring from 1995 to 2001 were part of the same hostile environment. Unlike the Seventh Circuit, the Ninth Circuit severed from the alleged "hostile-environment practice" acts alleged to have occurred outside the limitations period that were different in kind and perpetrator from timely acts.

Porter cannot be squared with the standard adopted by the Seventh Circuit. The severed acts in *Porter* occurred under the same supervisors and chain of command as the other acts. Under the Seventh Circuit's rationale in *Isaacs*, these acts could not have been excluded. Thus, Isaacs's case would have come out differently had it been reviewed by the Ninth Circuit. Indeed, the Ninth Circuit's approach is very similar to the District Court's in this case, which the Seventh Circuit rejected.

The Tenth Circuit has likewise applied the *Morgan* factors, and not a bright-line test, to sort stale from timely allegations of harassment. In *Duncan v. Manager, Dep't of Safety*, 397 F.3d 1300 (10th Cir. 2005), the court found that acts that were threatening rather than sex-based, that occurred during a different work assignment, and that were perpetrated by different people did not belong to "the same hostile work environment as those [largely sex-based] acts alleged during the filing period." *Id.* at 1310.[3] Nor did the court find significant that throughout the eighteen-year period spanning the plaintiff's allegations, she variously reported or could have reported her sexual harassment complaints to the same "Internal Affairs Bureau." *Duncan* thus also runs contrary to the Seventh Circuit's line-drawing. The District Court's treatment of Isaacs's claim would have been affirmed under the Tenth Circuit's approach.

The Eighth Circuit applied the *Morgan* factors in a case that was tried, *Rowe v. Hussmann Corp.*, 381 F.3d 775, 781 (8th Cir. 2004), finding that "acts before and after the limitations period were so similar in nature, frequency, and severity that they must be considered to be part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to this action." *Id.* The court did not rely on continuity within the plaintiff's chain of command.

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[3] The untimely acts alleged involved "frequent instances of threatening physical and psychological harassment," whereas the timely acts alleged involved "off-color comments and rumor-spreading perpetrated by a completely different set of actors" and so could not be considered part of the same hostile work environment. *Id.* at 1309.

Most recently, *Vickers v. Powell*, 2007 WL 1952369, at *10 (D.C. Cir. Jul. 6, 2007), implicitly rejects the Seventh Circuit's single factor "chain of command" approach, instead applying the *Morgan* factors to determine whether alleged acts dating from 1992 to 2000 belonged to the same hostile environment. *Vickers* concluded that retirement of the manager who allegedly harassed the plaintiff was insufficient to break the continuity of her claim. Interpreting *Morgan* to sever acts bearing "no relation" to a timely claim, the District of Columbia Circuit concluded that acts spanning eight years were not, according to the court, "so obviously different in kind for us to conclude that they are not related as a matter of law." *Id.* (reversing summary judgment granted by the district court in favor of the employer). Although *Vickers* cites *Isaacs* as *confer* (*cf.*), apparently for the proposition that the employer is the proper focus in Title VII cases, *Vickers*'s analytical approach is fundamentally inconsistent with *Isaacs* because it analyzes the similarity of the older and newer allegations of hostile environment rather than relying on the bright-line "chain of command" approach. Under the Seventh Circuit's approach, the manager's retirement would have broken the "chain of command" and severed the earlier incidents, producing a different outcome.

2. By disregarding Isaacs's transfer to a different area of the plant to address her complaints of hostile conduct, the Seventh Circuit's decision conflicts with the standard applied by the Tenth and Eleventh Circuits and some district courts. In *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258-59 (11th Cir. 2003), the Eleventh Circuit held that the employer's investigation and corrective disposal of pornographic material in the workplace severed those acts from any subsequent hostile environment. The court specifically noted that, after management's action, the plaintiff had no further trouble with the employee she complained about and did not subsequently

complain again to her employer—conditions equally met in *Isaacs*—and excluded the earlier acts from the alleged hostile environment. And, unlike the Seventh Circuit's single-minded "chain of command" focus, the Eleventh Circuit looked at whether management took appropriate corrective action when it learned of problems and severed some allegations because management had acted promptly to address them. *Id.* at 1258-59.

The Tenth Circuit and other courts also have applied *Morgan* similarly to sever from a hostile work environment claim acts addressed reasonably by management. *E.g.*, *Holmes v. State of Utah*, 483 F.3d 1057, 1063 (10th Cir. 2007) (transfer cuts off liability despite one incident of harassment after transfer); *Randall v. Potter*, 366 F. Supp. 2d 120 (D. Me. 2005) (employer's investigation and disciplining co-workers cuts off liability). The Seventh Circuit, on the other hand, unified into a single hostile environment claim different working environments and ignored management's corrective action as an intervening event.

3. The circuits have expressed their confusion over how to apply the limitations rule in hostile environment cases. The Fifth Circuit has asserted that it remains unclear "whether the Supreme Court believed its enunciated standard [in *Morgan*] to be a new requirement, or whether it left the Ninth Circuit free to continue to utilize its then existing standard"—a standard that permits courts to consider acts arising from a "systematic policy or practice that took place within the limitations period" for hostile work environment claims. *Celestine v. Petroleos de Venezuela SA*, 108 Fed. Appx. 180, 187 n.9 (5th Cir. 2004). The Ninth Circuit has itself commented that *Morgan* "does not offer precise guidance" on how to determine which acts can be considered for liability. *McGinest*, 360 F.3d at 1115 n.6 (concluding *Morgan*

"implies" that a previous act would be time-barred if it "had no relation to the later acts, or there was intervening action taken by the employer").

This confusion extends to whether the continuing violation doctrine—an equitable exception to charging deadlines—survives *Morgan*.[4] *Compare Watson*, 324 F.3d at 1258 (*Morgan* "rejected the application of the continuing violation doctrine in hostile work environment cases") *with Celestine*, 108 Fed. Appx. at 187 & n.9, 10 (stating that "it is unclear whether the Supreme Court believed its enunciated standard [in *Morgan*] to be a new requirement" and "[e]ven after the Supreme Court's *Morgan* decision, this Circuit continues to apply the continuing violation doctrine to hostile work environment claims"). And while many circuits have adopted the *Morgan* factors, some read *Morgan* to unify all acts but those with "no relation" to a timely claim, *see, e.g.*, *Vickers*, 2007 WL 1952369, at *10 (also citing *Morgan* factors), while others require a stronger relationship between acts. *Compare, e.g.*, *Duncan*, 397 F.3d at 1309-10 (finding a temporal relation insufficient to aggregate acts of a different nature and committed by different people into a single employment practice).

The circuits reflect disarray as to the proper standard and method for determining whether individual acts belong to the same hostile environment claim. This division suggests no means of resolution short of intervention by this Court.

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[4] For the principle that the continuing violation doctrine is an equitable exception, see, e.g., *West v. Philadelphia Electric Co.*, 45 F.3d 744, 754 (3d Cir. 1995).

B. The "Chain of Command" Rule Conflicts with the Apparent Intent of *Morgan* and Undercuts the Short, Precise Deadlines of Title VII.

1. The Seventh Circuit's holding that all acts of co-worker harassment are connected so long as the complaining employee remains within the same "chain of command," no matter how far separated in time, in kind, or in perpetrator, undermines both Congress's design of Title VII and appropriate incentives for employers. As this Court recognized in *Morgan* and *Ledbetter*, Congress assigned short filing deadlines to Title VII claims "to encourage the prompt processing of all charges of employment discrimination." *Ledbetter*, 127 S.Ct. at 2170.

The specified charging periods lie at the heart of Title VII's remedial scheme. To bring a Title VII lawsuit, an individual must file an EEOC charge within 180 or 300 days (depending on the state) "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-2(a)(1). As this Court has stressed, Title VII creates an "integrated, multistep enforcement procedure." *Ledbetter*, 127 S.Ct. at 2170. "[S]hort by any measure," the charging deadlines "reflect[] Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-71.

Morgan held that some acts outside the filing period may be deemed part of the hostile environment claim, but it did not automatically join all claims, no matter when they occurred. *Morgan*, 536 U.S. at 118. *Morgan* concluded that acts within and outside the filing period must be related in order to be considered part of the same claim. *Id.* at 121. *Morgan* made clear, moreover, that constituent acts of a hostile environment must be "cumulative." *Id.* at 115. Such

acts must, under *Morgan*, be sufficiently repetitive and related to contribute to an actionable whole.

The "accumulation" requirement is critical to the remedial scheme of Title VII. *Morgan* specifically directs courts to "determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice." 536 U.S. at 121. That determination is the principal gatekeeper against stale allegations of harassment and indispensable to maintaining charging deadlines for hostile environment claims. And adherence to charging deadlines is—as this Court has repeatedly recognized—"the best guarantee of evenhanded administration of the law." *Ledbetter*, 127 S.Ct. at 2171; *Morgan*, 536 U.S. at 108 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (noting benefits of "strict adherence to the procedural requirements specified by the legislature")).

2. Ignoring *Morgan*'s intent, the Seventh Circuit has redefined the boundary of a claim based on co-worker harassment by the continuity of individuals within the complaining employee's "chain of command." The new standard is categorical: "As long as the employee remains within a single chain of command . . . and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and *all* events may be considered . . . to determine whether that employment practice violates Title VII" assuming that at least one event is the subject of a timely administrative charge. *Isaacs*, 485 F.3d at 386 (emphasis added).

Most importantly, this rule conflicts with this Court's instruction that hostile environments are "the *cumulative* effect of individual acts." *Ledbetter*, 127 S.Ct. at 2175 ("[T]he actionable wrong is the environment, not the

individual acts that, taken together, create the environment"). Under *Morgan*, "individual acts" accumulate to create a hostile environment claim "for the purposes of timely filing and liability." *Id.* at 118; *see also id.* at 124 (O'Connor, J., concurring in part and dissenting in part) (noting disagreement with "the Court's conclusion that, *because of the cumulative nature of the violation*, if any conduct forming part of the violation occurs within the charge-filing period, liability can be proved and damages can be collected for the entire hostile environment" (emphasis added)).

The *Morgan* factors—which analyze whether acts within and outside the limitations period "involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers"—reflect this concern. *Id.* at 121. Each factor probes for a cumulative effect that transcends the harm of any individual act. *Id.* at 115-16 (a hostile work environment claim "cannot be said to occur on any particular day").

The Seventh Circuit jettisoned this multi-factored comparison, together with the principle of accumulation, when it defined hostile environment by sole reference to an employee's "chain of command." The individual acts need not be similar or related. Rather, a common "chain of command" will bind co-worker acts with no other connection into a single employment practice even if the acts are so different and distant they could have no cumulative effect. Acts in different locations, when the plaintiff had different duties and worked with different co-workers, could be united by dint of a common supervisor, human resources representative, or corporate manager alone. Conversely, the Seventh Circuit's ruling seems to indicate that similar acts of co-worker harassment could be severed by a change in

supervision because the complaining employee would no longer be within the same "chain of command."

Under the Seventh Circuit's rule of law, even an intervening employer action that separated a plaintiff from harassing co-workers and stopped the very acts she complained of (as occurred here) would not—despite settled law to the contrary—sever those acts from a timely claim. *Cf. Morgan*, 536 U.S. at 118 (identifying "intervening action by the employer" as an example of boundary between different hostile work environment claims); *Holmes*, 483 F.3d at 1063 (employer's reasonable intervening act cuts off liability); *Watson*, 324 F.3d at 1258-59 (same); *see also Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000) ("[T]he employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring."). Indeed, the Seventh Circuit has dispensed with every factor *Morgan* endorsed (*i.e.*, type, frequency, identity of perpetrators and employer intervention) to install a "chain of command" test *Morgan* did not mention. And the Seventh Circuit's rule of law, though categorical, adds to the confusion because it is vague and unexplained.[5]

3. Moreover, the Seventh Circuit's standard focuses exclusively on only one of the elements necessary to prove a hostile work environment claim. The elements of a hostile work environment claim are that: (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcome harassment; (3) the harassment was directed at the employee because of his or her protected characteristics;

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[5] The rule will likely open a collateral area of litigation as to who exactly matters in the undefined "chain of command."

(4) the harassment was sufficiently severe and pervasive to alter the employee's working conditions; and (5) there is some basis for employer liability. *Cotton v. Cracker Barrel Old Country Store*, 434 F.3d 1227, 1231 (11th Cir. 2006). The Seventh Circuit is therefore incorrect that "[d]oing nothing after receiving multiple complaints about serious conditions is a straight road to liability under Title VII." App. 7a. "Doing nothing" satisfies only the fifth element of the test. As stated in the EEOC's enforcement guidance for employer liability for unlawful harrassment, "The question of liability arises only after there is a determination that unlawful harassment occurred."[6]

The *Morgan* factors for assessing whether otherwise-time-barred conduct is part of a hostile work environment address the allegedly hostile conduct itself and therefore relate to the remaining elements of a hostile work environment claim. The Seventh Circuit's standard distorts *Morgan* because management continuity ("chain of command") alone cannot establish liability without underlying acts, nor is management continuity alone sufficient to unite timely and time-barred acts in a single hostile environment.

II. THIS CASE PRESENTS A RECURRING ISSUE OF VITAL IMPORTANCE.

The post-*Morgan* limitations issue presented in this case is no less important than that resolved in *Ledbetter*, 127 S.Ct. at 2169-72 (clarifying application of limitations period and

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[6] Equal Employment Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

Morgan to disparate pay claims). As in *Ledbetter*, the circuit conflict forces a federal agency—the EEOC—to choose between the uniform administration of a statutory scheme and obedience to the different holdings of courts in different regions, and therefore is an intolerable circuit conflict. Indeed, the EEOC receives *12,000 to 15,000* sexual harassment charges each year.[7] And a survey of decisions between November 1, 2005 and November 1, 2006, indicates that over six hundred reported federal cases during that time period addressed the issue of whether a "severe or pervasive" hostile work environment existed, an analysis inextricably bound to the determination of what conduct falls within the statutory time period for consideration.

The different limitations rules in different circuits pose an immediate dilemma for an agency that must determine how to review these charges and establish the scope of charge investigations. And, as in *Ledbetter*, the proper application of charging deadlines broadly affects the administration of Title VII claims in the lower courts. Limitations issues are often dispositive. Clarifying the factors used to determine what acts constitute a hostile environment would thus promote early resolution of, and diminish the now-frequent litigation over, limitations issues in district courts across the country.

This circuit conflict is also intolerable because it allows courts to disparately apply a uniform limitations scheme. Employers are no less entitled to protection from stale hostile

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[7] Equal Employment Opportunity Comm'n, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2006*, *available at* http://www.eeoc.gov/stats/harass.html (last visited Aug. 24, 2007).

environment claims in the Seventh Circuit than elsewhere.[8] Yet without intervention, the Seventh Circuit will now apply a rule that forgives statutory charging deadlines as to unrelated acts whenever they occur under a single chain of command. Conversely, the preservation of an employee's Title VII allegations should not depend on state of residence.

Resolution of the question presented is critical to preserving Title VII's statute of limitations. As this Court recently explained, statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 127 S.Ct. at 2170 (internal citations, quotations omitted). These goals depend, however, on the ability of lower courts to define the scope of the hostile environment. Without guidance from this Court, confusion will persist over which acts belong to a timely hostile environment claim.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR REVIEW BECAUSE THE PROPER STANDARD SEVERS STALE ALLEGATIONS AND REQUIRES JUDGMENT FOR THE EMPLOYER.

This case provides an appropriate vehicle for the court to address the question presented because the proper standard severs stale allegations and requires summary judgment on Isaacs's hostile environment claim. The alleged acts falling

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[8] Though the equitable doctrine of laches may offer some protection to employers, "Congress plainly did not think that laches was sufficient in this context." *Ledbetter*, 127 S.Ct. at 2171.

outside the filing period are different in type, perpetrator, severity and frequency from those falling within it.

1. The district court properly found that Isaacs's treatment in Packaging, as to which she did not timely complain, "occurred under entirely different working conditions, involving completely different actors, and simply cannot be described as relating to her timely allegations." App. 30a. None of the *Morgan* factors—whether acts were the same type, occurred frequently, and had the same perpetrators, *Morgan*, 536 U.S. at 121—suggest these allegations should be amalgamated into a single claim. As the district court found, Isaacs could not reasonably experience her different experiences in Packaging and Stretchwrap as contributing to the same hostile environment based on sex. App. 30a.

The District Court granted summary judgment on this basis, stating (before the Seventh Circuit altered the standard) that "[s]imply remaining with the same employer does not, by itself, indicate that these actions are part of the same hostile work environment claim as her timely allegations." App. 30a. It noted that "Isaacs makes no allegation and presents no evidence linking the acts and actors complained of during her time in Packaging to her time in Stretchwrap. Accordingly, the Court will not include alleged acts" occurring before the 300-day limitations period. *Id.* The Seventh Circuit's reversal was based only on the District Court's failure to include earlier conduct in the hostile work environment. App. 6a. Adopting a rule that excludes that stale conduct would mandate affirmance of the District Court's judgment.

2. This issue frequently arises in the interlocutory context, and this case therefore presents an appropriate opportunity for review. Like most limitations issues, the

question presented is one of law. And to afford the intended protection from stale claims, the limitations period should be applied *before* rather than after trial. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005) (resolving statute of limitations question in interlocutory appeal). This Court, moreover, has previously addressed significant questions of Title VII liability on review of summary judgment decisions. In *Burlington Industries, Inc. v. Ellerth*, for example, the Court granted certiorari following the Seventh Circuit's reversal of summary judgment in a sexual harassment case "to assist in defining the relevant standards of employer liability." 524 U.S. 742, 751 (1998). There, as here, intervention is justified as both speeding resolution of the litigation and deciding a question of importance to employers, employees, and a federal agency alike. Significantly, most limitations issues in employment cases are addressed through pretrial motions, so the posture of this case makes it an appropriate vehicle for addressing the issue in the same procedural context in which it will recur.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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